

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DIAMOND TERMINAL CORPORATION	:	DETERMINATION
for Review of a Denial of a License under	:	
Article 12-A of the Tax Law.	:	

Petitioner, Diamond Terminal Corporation, 160 East Railway Avenue, Paterson, New Jersey 07503, filed a petition for review of a denial of a license under Article 12-A of the Tax Law (File No. 805249).

An expedited hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Building #9, W.A. Harriman State Office Campus, Albany, New York on March 10, 1988 at 9:15 A.M. and continued on March 11, 1988. The hearing was continued at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on March 28, 1988 at 10:45 A.M. and March 29, 1988 at 9:45 A.M., and concluded on March 30, 1988 with all briefs to be filed by July 6, 1988. Petitioner appeared by Kramer, Eisenberg and Fisherman (Marvin E. Kramer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether sufficient grounds exist to support the Division of Taxation's proposed refusal to license petitioner as a terminal operator.

II. Whether, on the day before the administrative hearing began, the Division was permitted to raise an additional ground for its denial of a terminal operator license.

FINDINGS OF FACT

1. The stock of petitioner, Diamond Terminal Corporation ("Diamond"), is owned by its sole shareholder and president, Stanley Coven. Mr. Coven is also the sole shareholder and president of several other related corporations, including: A-1 Racefuel Transport, Inc., a licensed importing transporter; A-1 Racing Specialties, Inc. ("A-1 Racing"), a licensed distributor of motor fuel; and Milano Equities, Inc. ("Milano"), a former terminal operator which stopped doing business after June 25, 1987.

2. On July 17, 1987, Diamond filed an application for a license as a motor fuel terminal operator under Article 12-A of the Tax Law. The application was hand delivered to the Division of Taxation ("Division") by an attorney representing Diamond. At the same time, the attorney delivered an application for a license as a motor fuel terminal operator on behalf of Milano. Both applications were dated June 30, 1987.

3. On December 22, 1987, the Division issued to Diamond and Milano identical notices of a proposed refusal to license the applicants as terminal operators. The notices set forth two

grounds for the Division's determination:

- "(1) Pursuant to Tax Law Sec. 283-b(2)(g), Stanley Coven, who is the President, 100% shareholder and/or a responsible employee of the applicant, has committed acts specified in Tax Law Sec. 283-b(4) within the last five years, specifically, he has failed to comply with provisions of Article 12A or Article 28 of the Tax Law with respect to motor fuel or rules or regulations adopted pursuant thereto, by failing to timely file returns and pay taxes.
- (2) Pursuant to Tax Law Sec. 283-b(2)(e), Stanley Coven, who is the President, 100% shareholder and/or a responsible employee of the applicant, was an officer, director, 100% shareholder and/or responsible employee of another corporation, specifically, A-1 Racing Specialties, Inc. at the time a tax was finally determined to be due from such other corporation, which tax has not been paid in full."

4. On February 22, 1988, Diamond timely filed a petition challenging the Division's determination, and an administrative hearing was scheduled on March 10, 1988.

5. By letter dated March 7, 1988, the Division advised Diamond that the second ground for denial of a license, as stated in the notice of December 22, 1987, was withdrawn, because the filing of a petition in bankruptcy by A-1 Racing had prevented a final determination of tax due from that corporation. However, the Division asserted an additional ground for its refusal to license Diamond as follows:

"It is our position that Tax Sec. 283-b, subd. 2, par. (g), is a basis for denial of the terminal operators license in that Stanley Coven, who is the President, 100% shareholder and/or a responsible employee of the applicant, has committed acts specified in Tax Law Sec. 283-b, subd. 4, within the last five years. Specifically, he is also the President, 100% shareholder and/or a responsible employee of Milano Equities, Inc., which corporation operated a motor fuel terminal without a terminal operators license as required by Tax Law Sec. 283-b, subd. 1, and did not file the terminal operators reports required pursuant to Tax Law Sec. 286, subd. 2. and 20 NYCRR 410.11. Operation of a terminal without a license and failure to file terminal operators reports are each failures to comply with provisions of Article 12-A within the meaning and intent of Tax Law Sec. 283-b, subd. 4, and are, therefore, a proper basis for denial of a terminal operator's license in accordance with Tax Law Sec. 283-b, subd. 2, par. (g)."

6. At the hearing commenced on March 10, 1988, Diamond's representative moved to preclude the Division from submitting evidence regarding Milano's alleged operation of a terminal without a license, claiming that the Division's assertion of additional grounds for denial of a license denied Diamond adequate notice and due process of law.

7. The Administrative Law Judge denied Diamond's motion but offered to adjourn the proceeding to enable Diamond to prepare a response to the newly raised matter. Diamond declined the offer of adjournment, and the hearing proceeded.

A-1 RACING SPECIALTIES, INC.

8. In January 1987, A-1 Racing was a licensed motor fuel distributor engaged in importing and selling motor fuel in New York. Its volume of business was relatively small, and it had filed the minimum required bond of \$50,000.00 as security for its payment of motor fuel taxes.

9. By letter dated February 18, 1987, the Division requested that A-1 Racing file a surety bond of \$15,000,000.00. The amount of the bond was determined by the Division on the basis of its estimate of the six-month maximum potential tax liability of A-1 Racing.

(a) In January 1987, the Division learned that A-1 Racing was to become the importer of record at several terminals in New York, including the Jenny Mount Vernon Terminal, the Inwood Terminal and Commander Oyster Bay Terminal. The source of this information was not disclosed in the record.

(b) The previous importer of record at the three terminals had imported 107,104,778 gallons of motor fuel in the six-month period prior to January 1987. The tax liability on this number of gallons was \$15,423,088.00. The tax returns of the prior importer formed the source of this information.

(c) The Division was aware that A-1 Racing had imported 4,736,635 gallons of motor fuel at the Inwood Terminal from January 31, 1987 through February 10, 1987 and 2,450,130 gallons of motor fuel at the Mount Vernon Terminal from January 10, 1987 through January 29, 1987. The source of this information was not disclosed in the record; however, the volume was consistent with the amount of business done by the prior importer. Based on the most recent figures for A-1 Racing and the history of the prior importer, the Division projected that A-1 Racing would import approximately 18,000,000 gallons of motor fuel per month.

10. By letter dated February 19, 1987, the Division demanded that A-1 Racing file a return and make payment of taxes due for January 1987. The letter stated, in pertinent part:

"1. You are required to file your returns covering taxes due under Articles 12-A, 28 or 29 for January 1987 transactions involving the importation, manufacture, sale or use of motor fuel at 2:00 p.m., E.S.T. on February 20, 1987.

2. You will file the returns described in paragraph 1 above by hand delivering the returns to a messenger from this Department who will pick up the returns from your offices at 100 Merrick Road, Rockville Center, New York 11750, Room 302E.

3. You will make payment of the taxes covered by the returns described in paragraph 1 by certified check(s) and the certified check (s) must be hand delivered to the messenger who will pick up the check(s) and the returns as described in paragraph 2.

This letter constitutes a demand for the payment of taxes due under Articles 12-A, 28 or 29 for January 1987 transactions involving the importation, manufacture, sale or use of motor fuel."

11. A-1 Racing filed a petition protesting the amount of the surety bond. An administrative hearing was commenced in the Tax Appeals Bureau and adjourned sine die in order to allow the Division to recompute the required bond. A bankruptcy petition filed by A-1

Racing eventually resulted in a stay of this administrative proceeding.

12. By letter dated March 5, 1987, the Division directed A-1 Racing to file quarter-monthly motor fuel and sales tax returns and to make payments of the amounts shown on those returns by certified check. The following schedule was included in the letter:

<u>PERIOD</u>	<u>DATE DUE</u>
3/1/87 - 3/7/87	3/11/87
3/8/87 - 3/15/87	3/18/87
3/16/87 - 3/22/87	3/25/87
3/23/87 - 3/31/87	4/3/87
4/1/87 - 4/7/87	4/10/87
4/8/87 - 4/15/87	4/20/87
4/16/87 - 4/22/87	4/27/87
4/23/87 - 4/30/87	5/5/87
5/1/87 - 5/7/87	5/12/87
5/8/87 - 5/15/87	5/20/87
5/16/87 - 5/22/87	5/28/87
5/23/87 - 5/31/87	6/3/87

13. In addition to establishing a filing schedule, the letter required A-1 Racing to file motor fuel tax returns (MT-104) and sales tax prepayment forms (FT-945) for the first three quarters of each month by mailing them to Eugene Greco, a tax auditor in the District Office Audit Bureau. Returns for the fourth period of each month, covering all transactions for the calendar month, were to be sent to "Processing Unit, P.O. Box 1920, Albany, New York".

14. The returns filed by A-1 Racing in accordance with this schedule were not date stamped upon receipt by the Division. However, a check receipt log was maintained by the administrative bureau with whom the returns were filed, and it showed the date of receipt of each check. A-1 Racing sent the returns and checks via Federal Express which provided overnight delivery.

15. A-1 Racing filed its first returns under the quarter-monthly filing schedule on or about March 27, 1987. Included in the motor fuel tax return were two shipments of motor fuel made on March 2, 1987 and March 11, 1987, respectively. The second set of returns was filed on or about April 10, 1987. The motor fuel tax return showed one shipment of motor fuel made on March 14, 1987. On or about April 20, 1987, the Division received two sets of returns. One return showed shipments of motor fuel made on March 3, March 20, March 23, March 25, and March 27, respectively, and another return showed shipments of motor fuel made on April 2, and April 3, respectively. On April 22, 1987, the Division received a motor fuel tax return showing shipments made on March 18, March 21 and March 30, 1987.

16. The bookkeeper for A-1 Racing, Victor Trnka, prepared its tax returns. He would not report a shipment of motor fuel until he received all invoices, barge papers and inspection reports relative to the particular shipment. This generally occurred between four and seven days from the date of the shipment. Beginning in April, Mr. Trnka prepared and filed returns approximately every seven to 10 days. The motor fuel returns typically showed shipments of motor fuel made two to four weeks before the return was filed. Each form MT-104 provides a space where the month and year covered by the return is to be completed by the filer. Mr. Trnka completed this entry as indicated; however, he did not specifically enter the quarter-monthly period covered by

the return.

17. Following the pattern described in Findings of Fact "15" and "16" A-1 Racing filed five sets of returns in the month of April and five sets of returns in the month of May. The MT-104 containing shipments of fuel made from May 22, 1987 through May 29, 1987 was filed on or about June 11, 1987.

18. Although the quarter-monthly schedule contained in the Division's letter of March 5, 1987 stopped after the period ended May 31, 1987, A-1 Racing continued filing returns approximately every seven to ten days. Throughout March, April, May, June and most of July, Mr. Trnka was steadily in contact with Mr. Greco of the Division. The Division did not inform A-1 Racing in writing that the pattern of filing which was established by April 1987 was insufficient or inadequate.

19. By letter dated June 26, 1987, the Division informed A-1 Racing that the previous request for a \$15,000,000.00 bond was being withdrawn and replaced by a proposal for a \$4,000,000.00 bond. The original bond determination was based on the Division's calculation of the potential six-month tax liability of A-1 Racing. The revised bond amount was based on the actual cash receipts of A-1 Racing for the months of January, February, March and April 1987 and estimated receipts for May and June 1987. The letter did not constitute a final determination. It stated, in pertinent part: "If you are not in agreement with the proposed security, a written reply within seven (7) days of the date of this letter is required citing your reasons. After reviewing your reply, we will advise you of our final determination."

20. A-1 Racing responded to the Division's request for a \$4,000,000.00 bond by letter dated June 30, 1987. The letter conveyed A-1 Racing's disagreement with the amount of the bond requirement. It further noted that the administrative hearing to review A-1 Racing's protest of the Division's initial determination of a \$15,000,000.00 bond had been adjourned and that the outcome was still pending.

21. By letter dated July 30, 1987, the Division informed A-1 Racing that because A-1 Racing had failed to file the \$4,000,000.00 bond as requested, it would be necessary to continue the quarter-monthly filing schedule. The July 30 letter contained a schedule which began on the date on which the prior schedule had ceased, namely, June 1, 1987.

22. As of July 30, 1987, the last set of returns filed by A-1 Racing had been received by the Division on or about July 24, 1987, and they included shipments of motor fuel made during the period July 1, 1987 through July 6, 1987. On or about August 5, 1987, the Division received a set of returns from A-1 Racing covering shipments made during the period July 7, 1987 through July 11, 1987. These filings were not in compliance with the filing schedule mandated by the Division, but they were consistent with the pattern of filing established by A-1 Racing over a period of several months.

23. On or about August 5, 1987, the Division sent A-1 Racing the following letter:

"Our records indicate you have not filed Motor Fuel Tax Returns (MT-104) and Sales Tax form FT-945 for the period of July 7, 1987, to date. You were put on a quarter monthly filing until your bond is submitted to the State of New York for security.

Failure to file these reports will result in a cancellation of your motor fuel license M-2254. This letter constitutes a demand for filing, as required by section 283.5 of the tax law."

24. On August 10, 1987, all records and books in the offices of A-1 Racing were seized by a government taskforce investigating tax evasion by members of the motor fuel industry. The Division was a member of the task force.

25. By letter dated and delivered August 12, 1987, the representative for A-1 Racing responded to the Division's letter of July 30, 1987. The letter states, in pertinent part: that A-1 Racing never received a final determination of the \$4,000,000.00 bond requirement and thus was denied the right to protest such requirement; that under protest A-1 Racing agreed to continue quarter monthly filing of returns with payment of tax; and that A-1 Racing considered itself to be in substantial compliance with the quarter-monthly filing schedule established by the Division.

26. Also on August 12, 1987, Mr. Greco received a letter from the representative of A-1 Racing stating that the seizure of its records had precluded A-1 Racing from "precisely complying with prior directives" of the Division. In the absence of records, A-1 Racing proposed to wire transfer \$700,000.00 to the Division to satisfy any outstanding tax liabilities through the period July 31, 1987. Eventually, three payments were made for the month of July 1987: \$700,000.00 was wire transferred to the Division on August 13, 1987; a second wire transfer of \$250,000.00 was made on August 24, 1987; and a payment in the amount of \$38,265.20 was sent to the Division with a cover letter dated September 2, 1987. Included with this last payment was a copy of the sales tax prepayment on motor fuel report for the month of July 1987.

27. On August 19, 1987, the Division sent a letter to A-1 Racing withdrawing the security bond determination of \$4,000,000.00 and replacing it with a security bond determination of \$13,000,000.00. The new bond determination was based on the volume of business done by A-1 Racing in the period June 6, 1987 through July 11, 1987 as shown on the motor fuel returns filed by A-1 Racing for that period.

28. On August 25, 1987, the Division issued to A-1 Racing a Demand for Filing of Returns and Payment of Taxes. The returns requested were motor fuel tax returns and sales tax prepayment on motor fuel returns for the following periods:

July 8, 1987 - July 15, 1987
July 16, 1987 - July 22, 1987
July 23, 1987 - July 31, 1987
August 1, 1987 - August 7, 1987
August 8, 1987 - August 15, 1987

The notice stated: "If the returns and payment are not received within 10 days of the date of this letter, your registration as a motor fuel distributor is cancelled pursuant to Tax Law Section 283(5) effective 10 days after the date of this letter."

29. On September 4, 1987, the Division hand delivered to A-1 Racing a Notice of Cancellation of Registration as a Motor Fuel Distributor. The notice explained that the registration was being cancelled because of the failure of A-1 Racing to file returns and make payment of taxes in accordance with the notice and demand dated August 25, 1987.

30. Also on September 4, 1987, A-1 Racing filed a bankruptcy petition in the United States District Court for the Eastern District of New York.

31. By an order dated September 18, 1987, the bankruptcy court vacated the Division's notice of cancellation as having been issued prematurely. It further ordered A-1 Racing to file tax returns pursuant to Article 12-A and Article 28 of the Tax Law on a weekly basis beginning at the date of the order. Each return with payment was to be submitted by Friday of for the week ending on the prior Friday. A-1 Racing has filed returns in accordance with this schedule. Pursuant to Chapter 11 of the Bankruptcy Code, administrative proceedings before the Division of Tax Appeals regarding the original \$15,000,000.00 security bond have been stayed.

THE MOTOR FUEL TAX LAW

32. Before July 14, 1986, the Tax Law did not require the licensing of motor fuel terminal operators, although terminal operators were required, as of June 1, 1985, to file monthly information returns.

33. The law requiring licensing became effective on the date of its passage, July 14, 1986. The legislature set a target date of October 1, 1986 for the licensing of all terminal operators required to be licensed.

34. In order to implement the new legislation, the Division was required: to draft, print and distribute bulletins to interested parties summarizing the legal requirements for licensing; to draft various forms, including the license application form; to develop and implement administrative procedures within the Division for the processing of license applications; and to promulgate rules and regulations pursuant to Article 12-A as amended.

35. The first informational bulletins were issued in August 1986, and license applications did not become available until on or about September 29, 1986. Since it was impossible for the Division to license existing terminal operators by October 1, 1986, the Division adopted an informal policy of allowing terminal operators in operation to continue to operate if they submitted applications within one to two months after the applications became available. This policy was not reduced to writing or generally disseminated to terminal operators or other members of the motor fuel industry.

36. Applications for licenses were directed to the Processing Division which reviewed them for completeness and forwarded copies of the applications to the Audit Division and the Tax Enforcement Unit for their review.

37. The Audit Division reviewed each applicant's file to determine whether grounds existed to deny a license. Where deemed appropriate, the Audit Division would arrange to interview the principals associated with the terminal to obtain information. It might also conduct a field visit of the terminal operation.

38. In the fall of 1987, a working group consisting of representatives of the Processing Division, the Audit Division and the Tax Enforcement Unit began meeting to consider and act on outstanding license applications.

MILANO EQUITIES, INC.

39. Milano was incorporated in late December 1986. On February 3, 1987, Milano

entered into a five-year lease agreement with Mt. Vernon Energy Terminals, Inc. ("Mt. Vernon Energy"). The subject of the lease was a motor fuel terminal located in Mt. Vernon, New York. The lease agreement contained the following provisions in paragraph 13:

"2. That Landlord has applied for a Terminal Operator's License....However, it shall be Tenant's responsibility to obtain all necessary license and permits to continue the operation of the premises on its behalf and to keep them in full force and effect. In the event that Tenant is enjoined from operating the facility by Administrative Order, Court Order, operation of law or otherwise until such time as it shall secure a Terminal Operator's License from the State of New York, then and under those circumstances, the performance of all of Tenant's obligations hereunder shall be abated until such time as Tenant secures said licenses. In the event Tenant is denied a Terminal Operator's License or is enjoined from operating the facility by reason thereof, or otherwise, after a reasonable opportunity to cure, in the event that the Tenant is unable to resume operations of the facility, then, and at that time, this Lease shall come to an end and terminate as if said time were the end of the term herein seto [sic] forth and Tenant shall be entitled to receive the return of its security on deposit hereunder."

40. The first documented contact between Milano and the Division occurred on February 24, 1987. Robert Gordon, an excise tax investigator, visited the business offices of Milano at 100 Merrick Road, Rockville Centre, New York to prepare an intelligence profile on Milano. A field visit and investigation of this nature was consistent with the Division's procedure for processing applications for terminal operator licenses.

41. Mr. Gordon interviewed Stanley Coven and his attorney, Marvin Kramer. He was told that Milano had filed applications for a terminal operator license in December 1986 and had applied for New York State and Federal employer identification numbers which were pending at that time. Mr. Gordon was also told that Milano did not intend to buy or sell motor fuel from the Mt. Vernon terminal, but merely to store motor fuel there.

42. Sometime before March 25, 1987, Santos Sfogliano, an excise tax investigator, visited the Milano business office and requested the following documents: a Terminal Operator's Monthly Report of Inventory (FT-941); Terminal Operator's Individual Customer Reconciliations (FT-941.1); Uniform Manifests for Barges (FT-960); a current list of all thruput accounts (a thruputter rents terminal space for the storage of motor fuel); and a master list of all parties who removed fuel from the terminal under a thruput account. Although Milano's bookkeeper testified to mailing the tax forms to the Division, there was no evidence of receipt by the Division.

43. On the night of June 23, 1987, David Campbell, a Division investigator assigned to the Petroleum, Alcohol and Tobacco Bureau ("PAT-B"), conducted an inspection of the terminal operated by Milano. He observed several tank trucks on the premises and a barge unloading motor fuel. Mr. Campbell located the shift manager and asked to see Milano's terminal operator license. He was informed that no license was available at the terminal, and he was directed to Mr. Coven for further information. Mr. Campbell searched the Division's records and discovered that Milano had never been issued a license and that the Division had no record of ever having received a license application or terminal operator's reports from Milano.

44. In the late afternoon of June 24, 1987, a meeting was held at the offices of the Division in New York City. Present were Mr. Campbell; Dennis Spillane, a lawyer for the Division; Stanley Coven; and Robert A. Eisenberg, an attorney representing Mr. Coven. Either before the meeting took place or during the meeting the Division dispatched two investigators who closed down the operation of Milano's terminal.

45. At the meeting, Mr. Spillane informed Mr. Coven and Mr. Eisenberg that Milano could not operate without a license. He was advised that Milano had filed an application for a terminal operator license, and Mr. Coven provided Mr. Campbell with a photocopy of a worksheet copy of a terminal operator license application signed by Mr. Coven and dated February 9, 1987. Mr. Coven and Mr. Eisenberg expressed their belief that terminals were being allowed to operate with a license application pending. Mr. Coven admitted that Milano had been operating a terminal without a terminal operator license since early February 1987. Since Mt. Vernon Energy was a licensed terminal operator, Mr. Eisenberg requested that the terminal be allowed to reopen immediately and to operate under the landlord's license. At that time, Mr. Spillane denied that Mr. Vernon Energy was a licensed terminal operator and refused permission to allow the terminal to operate.

46. Mt. Vernon Energy was licensed as a terminal operator in May 1987. Pursuant to paragraph 13 of its lease agreement, Milano surrendered its lease to Mr. Vernon Energy effective as of the close of business June 24, 1987. Upon its receipt of the surrender of lease on June 25, 1987, the Division immediately allowed the terminal to reopen.

47. On June 25, 1987, Walter Slutsky, an investigator assigned to PAT-B, went to Milano's business offices where he received copies of Milano's terminal operator's reports for February, March and April 1987.

48. On or about July 6, 1987, Milano filed forms FT-941, and FT-941.1 for May 1987, and on July 28, 1987, Milano filed forms FT-941 and FT-941.1 for June 1987.

DIAMOND TERMINAL CORPORATION

49. Diamond's license application of July 17, 1987 was hand-delivered to the Division. It was accompanied by a cover letter on the letterhead of its Albany, New York attorneys and a bank check made payable to the New York State Tax Commission in the amount of \$10,000.00. Diamond's principal place of business was shown as 3631 Hampton Road, Oceanside, New York. A second address, 100 Merrick Road, Rockville Centre, New York, was also shown. The latter address was the business office of Stanley Coven.

50. By letter dated August 3, 1987, the Processing Division advised Diamond that its application could not be processed because it had failed to include a completed Certificate of Registration Questionnaire. This letter was mailed to Diamond at 100 Merrick Road, and it was returned to the Processing Division by the postal authorities. Shortly thereafter, Diamond's attorney was orally advised that mail directed to Diamond had been returned. On September 2, 1987 a completed questionnaire was received by the Processing Division.

51. On or about August 3, 1987, a \$10,000.00 performance bond was delivered to the Tax Enforcement Unit on behalf of Diamond. The bond was returned to Diamond with a request that certain corrections be made: that the bond be signed by both principal and surety; that a corporate seal be affixed to the bond; and that the acknowledgments before the Notary Public include the date of expiration of the notary's commission.

52. Correspondence regarding the performance bond among representatives of the Division, Diamond and its representative and Diamond's surety continued until at least December 11, 1987. Several bonds were received, cancelled and reinstated in that time. As of December 12, 1987, an effective bond was not filed on behalf of Diamond. Diamond's \$10,000.00 bank check remained with the Division.

53. By memorandum dated October 5, 1987, the results of a review of Diamond's license application by PAT-B were forwarded to the Processing Division. PAT-B's review included the following comments:

"Owner, Stanley Coven is also President of A-1 Racing Specialties, Inc. whose 12A was cancelled by this Department on 9/4/87. He is also sole officer of Milano Equities, which has been referred to the AG Office (8/6/87) for criminal prosecution. Intelligence files have linked Coven to persons and firms involved in motor fuel tax evasion since the onset of this bureau's involvement in such investigations."

54. PAT-B's review of Milano's license application file includes a finding that Milano was known to have operated a terminal without a license for a period of several months, ending in June 1987.

55. In October 1987, Diamond began an Article 78 proceeding seeking to compel the Division to issue it a license.

56. On or about November 24, 1987, the working group formed to review terminal operator license applications met to consider the status of pending applications. The applications of Diamond and Milano were included in the discussion. Individuals in the group had reviewed the application reviews prepared by PAT-B, and some were generally aware of the events surrounding A-1 Racing and Milano. An attorney representing the Tax Enforcement Unit knew of the pending Article 78 proceeding. He recommended that the applications of Diamond and Milano be denied on the basis of the failure of A-1 Racing to timely file returns and pay taxes due. The notice of December 22, 1987, proposing to deny Diamond a terminal operator license, was issued as a result of that recommendation.

CONCLUSIONS OF LAW

A. Tax Law § 283-b which provides for the licensing of terminal operators was adopted by the Legislature in 1986 (L 1986, Ch 276, § 3). It states:

"The department of taxation and finance, upon the application of a person who operates a facility where motor fuel is deposited, shall license such person as a terminal operator under this article except as otherwise provided in this section. The application shall be in a form and contain such information as the department of taxation and finance shall prescribe. No person, unless so licensed, shall operate a terminal, except that a person may operate a terminal without a license if all of the motor fuel stored in such facility is solely for such person's own use and consumption" (Tax Law § 283-b[1]).

B. The statute grants to the Commissioner of Taxation and Finance ("Commissioner") the discretion to refuse to grant an applicant a license under certain circumstances enunciated by the statute. The Commissioner may refuse to grant a license where, inter alia, he ascertains that:

"the applicant, an officer, director or partner of the applicant, a shareholder directly or

indirectly owning more than ten percent of the number of shares of stock of such applicant (where such applicant is a corporation) entitling the holder thereof to vote for the election of directors or trustees, or an employee of such applicant under a duty to act for such applicant in complying with any requirement of this article, has committed any of the acts specified in subdivision four of this section within the preceding five years" (Tax Law § 283-b[2][g]).

C. Subdivision four provides for the cancellation or suspension of the license of any terminal operator upon its failure, inter alia, "to comply with any provisions of [Article 12-A] or article twenty-eight" (Tax Law § 283-b[4]). It further provides that a license may be cancelled or suspended if the Commissioner determines that a licensee or an officer, director, shareholder, employee or partner under a duty to act for such licensee:

" (i) commits fraud or deceit in his operations as a terminal operator or has committed fraud or deceit in procuring his license;

(ii) has been convicted in a court of competent jurisdiction, either within or without the state, of a felony, within the meaning of subdivision eight of section two hundred eighty-three of this article, bearing on such terminal operator's duties and obligations under this chapter;

(iii) has knowingly aided and abetted a person who is not registered as a distributor in the importation, production, refining, manufacture or compounding of motor fuel; or

(iv) has knowingly aided and abetted the distribution of motor fuel which he has knowledge of as being imported, caused to be imported, produced, refined, manufactured or compounded by a distributor who is not registered by the department of taxation and finance." (Tax Law § 283-b[4].)

Petitioner would limit the grounds for refusal to issue a license to a finding that the applicant or a person under a duty to act for the applicant has committed one of the four acts enumerated in Tax Law § 283-b(4)(i) through (iv). This construction of the statute is too narrow and would bring about a result inconsistent with the intention of the statute. Tax Law § 283-b(2)(g) provides identical grounds for refusal to license as for cancellation or suspension of a license. If petitioner's statutory construction were adopted, one whose license was cancelled because of a failure to comply with Article 12-A could compel the Commissioner to issue it a new license simply by applying for the license in the form of a new corporate entity. Such an anomalous result could not have been intended. One of the stated grounds for cancellation of a terminal operator's license is the failure "to comply with any provisions of [Article 12-A] or article 28" of the Tax Law (Tax Law § 283-b[4]). Accordingly, a terminal operator's license may be denied to an applicant based upon the failure of any of the persons enumerated in Tax Law § 283-b(2)(g) to comply with any of the provisions of Articles 12-A or 28.

D. Tax Law § 283-b which, inter alia, prohibits the operation of a terminal without a license, was adopted in 1986 as part of a series of amendments to Article 12-A, "enhancing the enforcement of the taxes on motor fuel" (L 1986, ch 276). The legislation became effective on July 14, 1986. There is uncontroverted evidence that Milano operated a terminal without a license from early February 1987 until the terminal was closed by the Division on June 24, 1987. Terminal operator's monthly reports prepared by Milano show that fuel was stored in the terminal for various accounts and was not stored only for Milano's own use and consumption. Milano's operation of a terminal without a license contravened the unambiguous wording of the statute.

Stanley Coven was the sole shareholder and principal officer of Milano, and he alone was responsible for its operation and conduct. His failure and the failure of Milano to comply with Tax Law § 283-b(1) would appear to provide sufficient grounds for the Division's refusal to license Diamond. Petitioner argues to the contrary. Its argument rests on two grounds. First, it maintains that the Division's implementation and enforcement of the new licensing requirement was so arbitrary and inconsistent as to amount to an abuse of discretion. In addition, petitioner argues that the Division should have been precluded from raising Milano's conduct as a ground for refusing to license Diamond since that conduct was not originally charged in the notice of proposed refusal to license issued on December 22, 1986.

E. Tax Law § 283-b(2) and (4) set forth specific criteria for the Commissioner's consideration in making a licensing determination. Once the Commissioner has ascertained that any of the criteria set forth in Tax Law § 283-b(2) or (4) apply to a particular applicant, he then has the discretion to grant or not grant a license to that applicant. The statute provides that the Commissioner "may refuse to grant such applicant a license" (Tax Law § 283-b[2]; emphasis supplied).

Even where the grant of authority is broad, the power to refuse a license must be exercised in conformity with the express or implied purposes of the licensing law (Matter of Bologna v. O'Connell, 7 NY2d 155, 159). The limits of the licensing authority's discretion are determined by reference to the applicable statute. The licensing authority may deny a license only upon those grounds found in the statute, and its determination must be supported by the evidence. The burden is then upon the party seeking the license to show that he has a clear legal right to it (see, Matter of Maytum v. Nelson, 53 AD2d 221, 227, and cases cited therein).

F. Petitioner cited numerous instances of what it sees as an abuse of discretion in the implementation of the licensing law. These will be considered individually.

Tax Law § 283-b became effective on July 14, 1986. The enabling legislation contained the following provision:

"This act shall take effect immediately except that sections one through twenty-four of this act shall apply on or after such effective date (and provided that the department of taxation and finance shall immediately undertake all necessary steps and application review to insure that on October first, nineteen hundred eight-six all terminal operators and transporters, required to be licensed by the provisions of this act, are so licensed by such date" (L 1986, ch 276, § 37).

The Division found it impossible to meet the target date of October 1, 1986 and adopted a policy of allowing terminal operators in business before the effective date of the legislation to continue to operate pending the outcome of their license applications. Petitioner argues that such a policy unfairly discriminated between those in business and those not in business on July 14, 1986 and that the policy had no force or effect because it was not promulgated as a rule.

The issue to be determined here is whether the Commissioner has the authority to deny Diamond a license on the ground that Stanley Coven and Milano failed to comply with Article 12-A by operating a terminal without a license. The Division had a statutory duty to receive, review and act on terminal operator license applications. It was mandated to carry out this duty even in the absence of specific regulations, and it was authorized to implement the licensing law through case by case decision-making as long as it utilized some ascertainable standard

(Patchogue Nursing Center v. Bowen, 797 F2d 1137, 1143). Here, the statute gave the Commissioner the authority to deny a license on the basis that an applicant (or other person enumerated in Tax Law § 283-b[2][g]) operated a terminal without a license, but it did not require him to do so. Given that a contrary decision would have resulted in the cessation of business by all terminals operating before the effective date, the Commissioner's exercise of his discretion in favor of terminal operators in business before July 14, 1987 cannot be said to have lacked a rational basis or to have unfairly discriminated against operators like Milano who were not in business when the law became effective.

Petitioner maintains that the Division was aware of and acquiesced in Milano's conduct. Even if individual employees were aware that Milano was operating without a license, this would not justify Milano's continuing to operate in violation of the law nor would it nullify the Commissioner's authority to deny Diamond a terminal operator license.

Finally, petitioner asserts that the Division's actual policy during the licensing law implementation period was to allow anyone to operate a terminal as long as an application was filed and pending. There was no evidence that this was in fact the Division's policy, although it may have been the conventional wisdom of some members of the motor fuel industry. Furthermore, even if such a policy existed, petitioner did not establish that Milano filed an application before July 17, 1987. Therefore, Milano could not have been operating in reliance on such a policy.

G. Due process requires that a person be fully informed of the nature of the charges to be asserted at hearing so as to permit the person to adequately prepare and present a defense (Multari v. Town of Stony Point, 99 AD2d 838). An administrative agency may be permitted to lodge additional grounds for its action even after a hearing is commenced as long as the petitioner is given an adequate opportunity to respond to the agency's allegations (see, Matter of Heckt v. City of Lackawanna, 44 AD2d 763). Accordingly, in determining to refuse to grant a license to petitioner, the Division was not confined to the grounds set forth in its notice of proposed refusal to license but was free to raise additional grounds even at the time of hearing.

H. Since Milano's operation of a terminal without a license in and of itself constitutes sufficient ground for the Commissioner's refusal to license Diamond, it is not necessary to determine whether the filing and payment record of A-1 Racing provides additional grounds for the Commissioner's determination.

I. That the petition of Diamond Terminal Corporation is denied, and a Notice of Refusal to License may be issued immediately.

DATED: Albany, New York

ADMINISTRATIVE LAW JUDGE